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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. ANTHONY PAIGE Defendant and Appellant.	A155338 (Alameda County Super. Ct. No. 16CR017702)

A jury convicted defendant Anthony Paige of second-degree murder and possessing a firearm as a felon, and the trial court sentenced him to 60 years to life in state prison. Defendant was engaged in a fistfight with the victim, Reginald Blackburn, at the moment when Blackburn was shot. At trial, defendant claimed that one of the spectators to the fight, Brad Robertson, was the true shooter, but Robertson invoked his Fifth Amendment privilege against self-incrimination outside the presence of the jury and refused to testify.

On appeal, defendant raises several claims of error, including the contention that the trial court violated his constitutional right to compulsory process by refusing to compel Robertson to invoke the Fifth Amendment in front of the jury. Defendant alternatively contends that the trial court should have instructed the jury of Robertson's exercise of the privilege, and that his

trial counsel rendered ineffective assistance in failing to request such an instruction. Defendant further argues the trial court erred in denying his motion to admit out-of-court statements by Robertson, including a purportedly false alibi that Robertson gave to the police and his statement to a defense investigator that he was present at the scene of the shooting.

We conclude the trial court committed prejudicial error in excluding the evidence of Robertson's purportedly false statements to law enforcement. The evidence had been offered for a nonhearsay purpose and was relevant to establishing Robertson's consciousness of guilt, and there is a reasonable probability that defendant would have obtained a more favorable result had the evidence been admitted to bolster the defense's theory that Robertson, not defendant, was the shooter. Thus, we reverse the judgment and remand the matter for retrial.

Additionally, because the issues are likely to arise on retrial, we conclude the trial court did not err in excluding Robertson's statements to the defense investigator as hearsay, and we reject defendant's compulsory process and other claims relating to Robertson's exercise of his Fifth Amendment privilege.

FACTUAL AND PROCEDURAL BACKGROUND

In November 2017, the Alameda County District Attorney filed an information charging defendant with murder (Pen. Code, § 187, subd. (a); count 1)[1] and possessing a firearm as a felon (§ 29800, subd. (a)(1); count 2). The information alleged enhancements for personal use and discharge of a firearm causing great bodily injury or death (§§ 12022, 12022.5, subd. (a), 12022.53, subds. (b), (c) and (g)), a prior serious felony strike conviction (§§ 667, subd. (a)(1) and (e), 1170.12, subd. (c)), a prior prison term

[1] All further statutory references are to the Penal Code unless otherwise indicated.

enhancement (§ 667.5, subd. (b)), and a prior strike (§§ 667, subd. (e)(1), 1170.12, subd. (c)(1)).

I. Guilt Phase

A. The prosecution case

On December 7, 2016, at around 6:15 p.m., Oakland Police Officer Mauricio Perez arrived at 1122 East 17th Street to investigate a reported shooting and found Blackburn lying on the sidewalk with paramedics. Blackburn appeared to have suffered a gunshot wound to the stomach area. Officer Perez asked Blackburn if he knew who did this, and Blackburn said yes but that he would tell Perez once they left the area. At the hospital, Officer Perez asked Blackburn " 'Who shot you?' " and Blackburn replied, "Anthony, a male black."

Surgeons were initially able to save Blackburn's life, but he died a week later during a procedure to treat a bowel obstruction. The autopsy showed that the bullet entered Blackburn's lower back and exited at the front abdomen, which indicated that Blackburn was facing away from gun at the time of the shooting. The coroner found no evidence of combustion around the wound, indicating the shot was fired at a distance. The coroner concluded that Blackburn died of complications of a gunshot wound.

1. Tyree Santee

Tyree Santee was declared unavailable at trial. His preliminary hearing testimony was read to the jury, as follows.

Santee was living with Blackburn at the time of the shooting. He had known Blackburn since he was a child and considered Blackburn to be a father figure. Santee was also acquainted with defendant, whom he knew as "Ant."

On the evening of December 7, 2016, Santee drove to a house on East 17th Street to greet some friends. His friend Alex "Al" Blackwell, who lived at that house, was sitting with defendant. After Santee pulled over and exited the car, defendant walked up to Santee with clenched fists. They exchanged words and defendant challenged Santee to fight, but Santee thought defendant was joking. Santee then spoke for a few minutes with Robertson, who was Blackwell's brother and defendant's cousin, and whom Santee knew as "B." As Santee began to leave, defendant once again challenged him to fight. This time, defendant hit Santee on the left side of his mouth, causing him to bleed. Santee froze for a moment, got into his car, and drove to a parking lot near his home.

Blackburn, who was pulling out of the parking lot as Santee drove in, saw Santee wiping his face and asked what was wrong. Santee told Blackburn that he had "just got into it with Al and them over there." Blackburn then drove to the East 17th Street house with Santee following. As Blackburn asked others what happened, defendant approached Blackburn and said, " 'Yeah, yeah, I hit your son.' " Words were exchanged, and the two began fighting.

Santee testified that the fight lasted seven to ten seconds. There were people watching, but Santee could not recall who they were. When asked if Robertson was there, Santee testified, "No. I'm not sure." During the fight, Santee suddenly heard gunfire. He saw Blackburn pause and fall, and defendant with a gun in his hand. Blackburn screamed, "Why'd you shoot me?" The crowd scattered, and defendant looked at Santee and said " 'What?' " Santee put up his hands in the air. Defendant then walked up 11th Avenue, and Santee called 911.

During cross-examination, Santee testified that at the moment he heard a gunshot, defendant and Blackburn were face-to-face, and Blackburn fell "straight back." Santee admitted he never told Oakland Police Detective Leonel Sanchez that he saw defendant's arm extended with a gun as the shot rang out, nor did he tell Detective Sanchez that he saw defendant holding a gun as the shot rang out. Santee was further asked, "And your recollection is you told Sanchez that you did not see a gun in [defendant's] hand at that time; is that right?" Santee responded, "Yes."

2. Lazaro Barrientos

Lazaro Barrientos testified he lived in a second-floor apartment on East 17th Street. On the evening of the shooting, Barrientos could hear a party going on in front of the house across the street. He heard arguing outside, and as he looked out the window to check on one of his children taking out the trash, he heard two shots and saw defendant by a tree. Barrientos also saw a man lying on the ground next to the tree, and defendant getting into the back of a car that drove away. When asked if he saw defendant with a gun, Barrientos responded, "Yes." Asked if he saw defendant shoot the man lying on the ground, Barrientos responded, "Well, him, yeah, I just saw the guy fall."

On cross-examination, Barrientos admitted that he had previously testified at the preliminary hearing that he did not see defendant with a gun, and that the shots had been fired before he looked out the window.

3. Detective Sanchez

Detective Sanchez testified he interviewed various witnesses, including Blackwell, Barrientos, Robertson, Darnell Williams, and Santee. He met with Santee four times. During their first interview, Detective Sanchez asked Santee what kind of gun he saw defendant with, and Santee replied,

" 'I didn't even see the gun.' " When Detective Sanchez asked Santee how he knew Blackburn was shot, Santee stated, " 'Like, I don't know. It was struggling–I mean fighting. And I guess he just shot him like that. It happened so fast.' "

Detective Sanchez reviewed Santee's 911 call. According to Sanchez, Santee told the dispatcher that Blackburn had been shot in the leg. When the dispatcher asked Santee whether or not he saw a gun, Santee said, " 'I did not see the gun used.' "

Detective Sanchez further testified that Santee gave differing accounts as to whether Robertson was present at the shooting. During the first and second interviews, Santee stated that "B" (Robertson) was present both when defendant punched Santee and at the time of the shooting, but by the third interview, Santee "could not be sure if B was actually present at the time of the shooting."

4. DNA Expert

The police recovered a gun at the crime scene but found no bullets, bullet fragments, or shell casings. Criminalist Chani Gonzalez was able to obtain a small amount of DNA from the gun and generate a "low level" profile. She could not tell, however, how many donors there were. Assuming one donor, the partial profile would occur randomly in one out of 77 million people, and Gonzalez could not eliminate defendant as the potential source of the DNA profile. Assuming multiple donors, the partial profile was inconclusive.

B. The defense case

1. Darnell Williams

Williams, who went by the nickname "D'Funk," was close friends with both Blackburn and defendant and was present during the fight and the

shooting. Williams testified that Blackburn said he was upset about his son getting beat up. Before defendant and Blackburn started fighting, Blackburn asked Williams to make sure no one else in the crowd intervened so that it was a "fair fight."

Williams testified that during the fight, Blackburn was getting the better of defendant by grabbing defendant's hoodie. When defendant attempted to remove the hoodie, it got stuck on his head. As Williams attempted to intervene to stop Blackburn from attacking defendant while the hoodie was still over his head, Williams heard a gunshot. At the time of the gunshot, defendant and Blackburn were still standing face-to-face about five feet from each other, and the shot came from Williams's right side behind Blackburn. Williams never saw defendant pull out a gun.

Williams gave a statement to Detective Sanchez in late December 2016 in which he said that he saw "Fred, Brian, Al and Ant" running down the street after the shooting. At trial, Williams testified that he "meant to say Brad," not Brian, and that the "Ant" he mentioned was not defendant.[2] Williams testified that he did not know who fired the gun, but that it was not defendant.

2. Alonzo Boatner

Alonzo Boatner was defendant's brother. He was also friends with Robertson, with whom he had grown up and referred to as his cousin.

Boatner testified that the day after the shooting, he had a conversation with defendant, Blackwell, and Robertson. During this conversation, Robertson "said that he fired the gun because he was protecting his family,

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[2] According to the record, Santee testified that an individual identified by the prosecution as "Ant" Burrell was at the East 17th Street location when Blackburn and defendant fought. Santee made no mention of defendant running from the scene after the shooting; instead Santee said he saw defendant leave by walking up 11th Avenue.

which is Anthony." "[H]e just said he went and got the gun because he was protecting his family." Robertson further told Boatner that he was going to "own up" to what he did.

Boatner testified that he thought Robertson would come forward and take responsibility for the shooting, but Robertson "just kind of disappeared" and Boatner could no longer get in contact with him. Boatner said it was odd that Robertson was no longer coming around and answering or picking up his phone. Boatner did not immediately contact the police about Robertson's confession because he did not witness the shooting. After defendant was arrested, Boatner contacted the police to tell them that Robertson was the shooter. According to Boatner, the police did not take him seriously.

Boatner further testified he saw the gun that the police recovered from the crime scene two months before the shooting incident. He saw Blackwell put the gun in a barbecue grill at the side of his house. On another occasion in which defendant was present, several individuals passed the gun around.

3. Other defense witnesses and evidence

Dr. Mitchell Eisen, an expert in eyewitness memory and suggestibility, testified as to the ways in which memories can be faulty.

Dr. Katherine Raven, an expert in forensic pathology, testified that she saw no obvious stippling in photographs of Blackburn's skin.

A search of defendant's residence uncovered no bullets or firearms. No usable fingerprints were discovered on the gun the police recovered from the crime scene.

4. Brad Robertson

The defense intended to call Robertson to answer questions about his presence at the shooting and whether he had confessed to being the shooter. At a hearing held outside the presence of the jury, Robertson, on the advice of

his counsel, invoked the Fifth Amendment privilege against self-incrimination. The trial court found that Robertson validly invoked the privilege with regard to the subject matter of the proposed testimony, and the court ruled that Robertson "will not be testifying in this court and not be called as a witness. Be restricted, prevented from it." The court further denied defendant's request to have Robertson invoke the privilege in the presence of the jury. Relying on *People v. Richardson* (2008) 43 Cal.4th 959 (*Richardson*), the court stated, "the fact that we put him in here to take the Fifth in front of the jury would pretty much invite the error to have the jury improperly be influenced as it related to the subject matter of this case. They would speculate regarding the information and draw inferences that they shouldn't because they don't know."

Defendant then filed a motion to admit statements previously made by Robertson as declarations against penal interest. The first set of statements consisted of Robertson's statements to Detective Sanchez in January 2017, in which Robertson denied being present during the shooting. Robertson told Detective Sanchez that on the day of the shooting, he got off work at 11:00 a.m. and went to his brother's (Blackwell) house on East 17th Street, where he talked with Blackwell before leaving at around 12:30 p.m. Robertson claimed that he went straight home afterwards and never returned to Blackwell's house that day. The second set of statements consisted of those made by Robertson to defense investigator Jerry Maya in March 2018, in which Robertson said he was present during the shooting and did not see defendant with a gun before or during the fight.

The trial court denied the motion, noting that it was already going to allow Boatner's testimony regarding Robertson's confession. "I understand you have a witness who is going to come in and say that Brad Robertson,

outside the presence of everybody said . . . he's the shooter. . . . You'll get that information. That's a statement against penal interest. They will make a determination, based upon what you got out, that you were able to fortunately get out of that witness yesterday. I allowed those questions. You've got that foundation that he's there, so that is denied. You will be able to call that other witness." Defendant's counsel argued that Robertson's statements to Detective Sanchez and Maya were admissible to show Robertson's consciousness of guilt, but the trial court responded, "No, it's all hearsay." There is no indication the court conducted an analysis under Evidence Code section 352 in excluding these statements.

C. Closing Arguments and Verdict

In his closing argument, the prosecutor argued in relevant part that Boatner was not credible because he was defendant's brother. "You heard from [defendant's] brother. . . . They're biased. . . . They have an interest in getting him off. And I put it to you that the evidence shows that they were lying." The prosecutor continued that Boatner was "the defendant's family. He came in here and lied for him because that is what some families do."

The prosecutor also derided the defense's theory that Robertson was the true shooter, claiming the defense simply picked someone out of the crowd who was not from the neighborhood to pin the crime on. "And so when the defendant is deciding what his defense is going to be at trial, he just picks someone. He picks someone who was there, and he picks someone who couldn't really defend himself. . . . They picked him because he's an outsider and they're not worried about him coming back at them." The prosecutor claimed that the defense "put it on Brad, a person who has no motive. What motive would Brad have to shoot and kill the victim? None. Zero."

The jury found defendant guilty of second-degree murder and possessing a firearm as a felon. On count one, the jury found true the allegations that defendant personally and intentionally discharged a firearm causing death.

II. Penalty Phase

The trial court found true the allegation that defendant had suffered a prior felony conviction. The court declined to strike the 25 years to life enhancement under section 12022.53, subdivision (d). The court then sentenced defendant to 60 years in state prison, including a term of 30 years to life on count one (15 years to life doubled for the prior strike (§§ 667, subd. (e)(1), 1170.12, subd. (c)(1))), and a consecutive term of 25 years to life for the firearm discharge enhancement (§ 12022.53, subd. (d)), plus five years for the prior felony conviction (§ 667, subd. (a)). On count two, the court imposed a concurrent term of four years (the middle term of two years doubled for the prior strike). Finally, the court ordered defendant to pay a $10,000 restitution fine (§ 1202.4, subd. (b)(1)), two $40 court operations assessments (§ 1465.8) and two $30 criminal conviction assessments (Gov. Code, § 70373).

Defendant appealed.

DISCUSSION

I. Exclusion of Robertson's Statements to Detective Sanchez

A trial court's decision to admit or exclude evidence is a matter committed to its discretion " 'and will not be disturbed except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice.' " (*People v. Brown* (2003) 31 Cal.4th 518, 534; see Evid. Code, § 354.) On review for abuse of discretion, the trial court's findings of fact are reviewed for

substantial evidence, its conclusions of law are reviewed de novo, and its application of the law to the facts is reversible only if arbitrary and capricious. (*People v. Bennett* (2009) 45 Cal.4th 577, 621.)

Defendant argues the trial court erred in refusing to admit Robertson's statements to Detective Sanchez, including his false alibi that he was home at the time of the shooting, because the statements were offered for the non-hearsay purpose of showing Robertson's consciousness of guilt. We agree that the trial court erred as a matter of law in summarily excluding the evidence as hearsay. We further conclude that the erroneous exclusion of this evidence was prejudicial.

A. Consciousness of guilt

An out-of-court statement offered for the truth of the matter stated is hearsay and inadmissible unless an exception applies. (Evid. Code, § 1200, subds. (a), (b).) A statement is not hearsay, however, when it is offered to show the statement is false. (*People v. Ogg* (2013) 219 Cal.App.4th 173, 184 (*Ogg*).) "A prior statement, although exculpatory in form, may prove highly incriminating at the trial because, upon a showing of its falsity, it can constitute evidence of consciousness of guilt." (*People v. Underwood* (1964) 61 Cal.2d 113, 121.) Thus, a person's false statements to the police may be offered for the nonhearsay purpose of showing consciousness of guilt and are admissible without a hearsay exception. (*People v. Kimble* (1988) 44 Cal.3d 480, 496.)

Cases allowing consciousness of guilt evidence generally involve circumstances where the person's lie "related directly to the crime charged—for example, a false alibi." (*People v. Fritz* (2007) 153 Cal.App.4th 949, 957 (*Fritz*).) "Consciousness of guilt is proved . . . by fabrications which, like devious alibis, are apparently motivated by fear of detection, or which, like

devious explanations of the possession of stolen goods, suggest that there is no honest explanation for incriminating circumstances and thus are admissions of guilt." (*People v. Albertson* (1944) 23 Cal.2d 550, 582 (Traynor, J., concurring).)

Under these authorities, the trial court erred as a matter of law in excluding Robertson's statements to Detective Sanchez as inadmissible hearsay. Because the statements were offered to show that Robertson gave a *false* alibi in response to police questioning, the evidence was offered for a nonhearsay purpose. (*Ogg*, *supra*, 219 Cal.App.4th at p. 184.)

The People concede that the hearsay rule is not implicated but maintain that Robertson's statements to Detective Sanchez were not relevant because any inference of consciousness of guilt was speculative. The People further contend that any error in excluding Robertson's statements was harmless because the inference of consciousness of guilt was too tenuous, and the evidence actually had greater potential to harm defendant than help him. We are not persuaded.

Robertson gave the statements at issue during an interview with Detective Sanchez, who expressly told Robertson that he was trying "to rule you out of having anything to do with the shooting. . . . Even though you said, 'I wasn't there, (Sanchez).' And there is an individual that says you were there. (D-Funk) says you were there." Sanchez noted that Robertson's own brother (Blackwell) "actually said you were out there," and Sanchez explained that it was necessary to interview Robertson "because everybody's gonna believe that you did it . . . . They're gonna believe that was Brad 'cause he sees his cousin getting his ass kicked and then—then if that's true, then—then the next step is was it purposeful? Was it an accident?" Throughout the

detective's questioning, Robertson maintained the alibi that he was at home at the time of the shooting.

Had the jury been permitted to hear the evidence of Robertson's alibi in the context of this investigative interview, there was ample evidence supporting the falsity of the alibi. Not only did Robertson's life-long friend Boatner testify that Robertson confessed to the shooting the day after it occurred, but Santee's statements to Detective Sanchez and Williams's trial testimony placed Robertson at the scene of the fight and shooting. Had one or more jurors found the alibi to be false, they could reasonably have concluded that Robertson lied to avoid being linked to the shooting and that his false alibi reflected consciousness of guilt. On this record, the inference of consciousness of guilt was neither speculative nor tenuous.

People v. Hartsch (2010) 49 Cal.4th 472 (*Hartsch*), cited by the People, does not compel a different conclusion. There, the defendant proposed a jury instruction that a false or misleading statement by any witness concerning the crimes for which the defendant was being tried could be considered a circumstance tending to prove the witness's consciousness of guilt. (*Hartsch*, *supra*, at pp. 500–501, fn. 29.) The Supreme Court found no support for such an instruction, as it "would have told the jury that untruthful testimony about the crimes from *any* witness could be taken as indication of that witness's guilt," which "might lead to absurd results." (*Id*. at p. 501.) In contrast, this case concerns the relevance of statements by one particular individual who defendant claims was the shooter and whose purported lies were made in response to questioning by police investigating his involvement in the crime. As indicated, an inference of consciousness of guilt under the circumstances here would not be unreasonably speculative or absurd. Indeed, as the cases cited above demonstrate, a false alibi is the paradigmatic

example of a falsehood that gives rise to an inference of consciousness of guilt. (*Fritz*, *supra*, 153 Cal.App.4th at p. 957; *People v. Albertson*, *supra*, 23 Cal.2d at p. 582.)

B. Prejudice

Having found error, we cannot say it was harmless under the standard applicable to state law error in evidentiary rulings. (*People v. Watson* (1956) 46 Cal.2d 818 (*Watson*).) A reversal is warranted if it is reasonably probable that defendant would have obtained a more favorable result had the trial court admitted the evidence. (See *id.* at p. 836.) Where a criminal defendant has been found guilty, "a hung jury is considered a more favorable result than a guilty verdict." (*People v. Soojian* (2010) 190 Cal.App.4th 491, 520 (*Soojian*).)

It bears emphasizing that this was not a case where the evidence of defendant's guilt was so "overwhelming" as to overcome the error. (See, e.g., *People v. Cummings* (1993) 4 Cal.4th 1233, 1294–1295.) It does not appear that the police could conclusively determine whether the gun recovered at the crime scene was the murder weapon, and moreover, the DNA evidence linking defendant to that gun was inconclusive. Although Blackburn identified defendant as his shooter, the autopsy established he was shot by someone behind his back. Both defense witness Williams and prosecution witness Santee gave testimony that defendant and Blackburn were facing each other at the moment they heard a gunshot and saw Blackburn fall. The evidence that Blackburn was shot in the back with no obvious stippling was consistent with Williams's testimony that the shot came from Williams's right side behind Blackburn. And though Santee and another prosecution witness, Lazaro Barrientos, both testified to seeing defendant with a gun at the crime scene, such testimony contradicted their earlier statements on the

topic. That is, Santee previously told a 911 dispatcher and Detective Sanchez that he did not see a gun. Similarly, Barrientos admitted on the stand that he had testified to the contrary at the preliminary hearing.

Although the jury heard (and obviously rejected) Boatner's testimony that Robertson had confessed to the shooting the day after it occurred, the question is whether it is reasonably probable that the admission of Robertson's alibi statements to Detective Sanchez would have led to a more favorable outcome. Here, the prosecutor pointedly attacked Boatner's credibility by arguing that Boatner had a motive to lie to protect his brother. The false alibi evidence, however, would likely have buoyed Boatner's credibility and the defense case as a whole, since the same individual who Boatner claims confessed to the crime was, by his own actions, conducting himself in a manner plainly inconsistent with innocence. (*Fritz*, *supra*, 153 Cal.App.4th at p. 959 ["an innocent person has no reason to lie about the facts of the crime because the truth will establish his or her innocence"].)

Additionally, had the trial court admitted Robertson's statements and the context in which they were made, the jury would have learned that Detective Sanchez had brought Robertson in for questioning "because everybody's gonna believe that you [Robertson] did it" since "he sees his cousin getting his ass kicked." This statement—reflecting a theory of Robertson's possible motive in the investigating detective's own words—would likely have assisted the defense in withstanding the prosecutor's arguments that the defense was weak because Robertson had "[z]ero" motive to shoot Blackburn.

In short, had the jury heard the evidence of Robertson's interview with Detective Sanchez and concluded that Robertson gave a false alibi, there is a reasonable probability that such evidence would have caused at least one

juror to view Boatner's credibility in a more positive light and to assess more critically the prosecution's dismissiveness of Robertson's possible involvement in the shooting. Coupled with the circumstance that the prosecution's case was based on prosecution witnesses who gave testimony that was both exculpatory and inculpatory, and on the statement of Blackburn who was facing away from the person who shot him, it is reasonably probable that the false alibi evidence would have tipped at least one juror to entertain a reasonable doubt about defendant's guilt. (*Soojian*, *supra*, 190 Cal.App.4th at p. 520.)

We conclude the trial court prejudicially erred in refusing to admit the evidence of Robertson's statements to Detective Sanchez regarding his whereabouts at the time of the shooting. Those statements were admissible as nonhearsay evidence relevant to Robertson's consciousness of guilt. Accordingly, the judgment must be reversed.[3]

II. Issues Likely to Arise on Retrial

Defendant makes several other contentions on appeal relating to the guilt and penalty phases of trial which are either moot or not likely to arise again on retrial. We will, however, address defendant's contentions that the trial court erred by (1) excluding the evidence of Robertson's out-of-court statements to defense investigator Maya as declarations against penal interest, and (2) refusing to compel Robertson to assert his Fifth Amendment privilege against self-incrimination in front of the jury, as these issues are likely to arise on retrial. (*People v. Sam* (1969) 71 Cal.2d 194, 201.) For the reasons below, we conclude the trial court did not err.

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[3] We note the entire transcript of Detective Sanchez's interview with Robertson spans 116 pages. We leave it to the trial court to determine what portions of the transcript, in addition to those statements identified in this opinion, should be admitted on retrial as relevant to Robertson's consciousness of guilt.

A. Statements against penal interest

Under the hearsay exception for statements against penal interest, evidence of a statement by a declarant is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness,[4] and the statement, when made, subjected the declarant to the risk of civil or criminal liability that a reasonable person in his or her position would not have made the statement unless he or she believed it to be true. (Evid. Code, § 1230.) Furthermore, the party seeking to introduce such evidence must make a threshold showing that the declaration was sufficiently reliable to warrant admission despite its hearsay character. (*People v. Geier* (2007) 41 Cal.4th 555, 584 (*Geier*); *Cudjo*, *supra*, 6 Cal.4th at p. 607.)

Defendant moved for admission of Robertson's statements to Maya that he was present during the shooting and did not see defendant with a gun before or during the fight. He argues these statements were against Robertson's penal interests because they contradicted his alibi. The People contend the statements lacked sufficient adverseness to Robertson's penal interests because there were many other people present at the time of the shooting who were not suspects. We need not resolve this question, because even assuming Robertson's statements to Maya were generally against his penal interests, this is not dispositive of the statements' trustworthiness. (*Geier*, *supra*, 41 Cal.4th at p. 584.)

In determining whether an out-of-court statement is sufficiently trustworthy to be admissible despite its hearsay character, we take into account not only the words but the circumstances under which they were uttered. (*Geier*, *supra*, 41 Cal.4th at p. 584.) Here, the trial court was

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[4] There is no dispute that Robertson, having invoked his privilege under the Fifth Amendment, was unavailable within the meaning of Evidence Code section 1230. (*People v. Cudjo* (1993) 6 Cal.4th 585, 616 (*Cudjo*).)

presented with two completely inconsistent statements by Robertson as to his whereabouts at the time of the shooting, i.e., Robertson's statements to Maya flatly contradicted his statements to Detective Sanchez. Thus, the trial court could reasonably conclude that, on their face, at least one of the statements had to be untruthful, rendering the reliability of either of them questionable for purposes of the hearsay exception. (*Id.* at p. 585.) In light of these circumstances, the trial court was within its discretion to conclude that Robertson's statements to Maya were not sufficiently reliable to warrant admission under Evidence Code section 1230. (*Cudjo*, *supra*, 6 Cal.4th at p. 607.)

B. Robertson's Exercise of Fifth Amendment Privilege

"It is well settled that the jury is not entitled to draw any inferences from the decision of a witness to exercise his [or her] constitutional privilege whether those inferences be favorable to the prosecution or the defense. [Citation.] The rule is grounded not only in the constitutional notion that guilt may not be inferred from the exercise of the Fifth Amendment privilege but also in the danger that a witness's invoking the Fifth Amendment in the presence of the jury will have a disproportionate impact on [its] deliberations. The jury may think it high courtroom drama of probative significance when a witness 'takes the Fifth.' " (*Bowles v. United States* (D.C. Cir. 1970) 439 F.2d 536, 541–542 (*Bowles*).)

Accordingly, the California Supreme Court has held that "permitting the jury to learn that a witness has invoked the privilege against self-incrimination serves no legitimate purpose and may cause the jury to draw an improper inference of the witness's guilt or complicity in the charged offense." (*Cudjo*, *supra*, 6 Cal.4th at p. 619.) " 'Therefore, "it is the better practice for the court to require the exercise of the privilege out of the

presence of the jury." [Citation.] We have "commend[ed]" the approach "as a means by which to avoid the potentially prejudicial impact of the witness asserting the privilege before the jury." ' " (*Richardson*, *supra*, 43 Cal.4th at p. 1011.) Here, given the defense's theory that Robertson was the sole individual responsible for the shooting, there was a clear potential for the jury to draw an improper inference of Robertson's guilt had the trial court compelled him to assert the privilege in front of the jury.

Defendant maintains nonetheless that his constitutional right to compulsory process under the Sixth Amendment was violated by the trial court's decision. He is mistaken. "[T]he Sixth Amendment can give the right to compulsory process only where it is within the power of the . . . government to provide it. (*United States v. Greco* (2d Cir. 1962) 298 F.2d 247, 251.) Thus, "[t]he Sixth Amendment requires that a witness be brought to court, but it does not require that he take the stand after refusing to testify. [Citation.] Once a witness appears in court and refuses to testify, a defendant's compulsory process rights are exhausted. It is irrelevant whether the witness's refusal is grounded in a valid Fifth Amendment privilege, an invalid privilege, or something else entirely." (*United States v. Griffin* (5th Cir. 1995) 66 F.3d 68, 70, fn. omitted.) Here, defendant's compulsory process rights were exhausted once Robertson appeared in court and asserted his privilege against self-incrimination. (*Ibid.*; see *People v. Bernal* (1967) 254 Cal.App.2d 283, 294–295 [noting that defendant claiming compulsory process violation "had the right to call the witness and the witness appeared and was sworn"].)[5]

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[5] To the extent *Gray v. State* (2002) 368 Md. 529 and *State v. Whitt* (2007) 220 W.Va. 685, abrogated in part by *State v. Herbert* (2014) 234 W.Va. 576, 584, hold otherwise, we find their analyses unconvincing.

Defendant contends the trial court was required to instruct the jury sua sponte that Robertson had invoked the privilege and that the jury may not draw any inferences from it. Alternatively, he argues, defense counsel's failure to request such an instruction constituted ineffective assistance of counsel. In defendant's view, the instruction was necessary because the jury did not know why the defense did not call Robertson to the stand. Because the trial court had barred the defense from calling Robertson, "the jury was provided with an incorrect inference" that the defense based on Robertson's guilt was frivolous or insincere. Irrespective of how we analyze defendant's arguments, either as an issue of the trial court's sua sponte duties or one of ineffective counsel, we find no reversible error.

In *Richardson*, the Supreme Court held that the trial court did not err in refusing to instruct the jury that a witness (Brown) did not testify because of his assertion of the privilege, as this "may have invited the jury to infer that Brown had invoked the privilege because he was guilty of the offense. Such inference is impermissible." (*Richardson*, *supra*, 43 Cal.4th at p. 1012.) Indeed, commenting to the jury that Robertson had invoked the Fifth Amendment privilege would have violated Evidence Code section 913, subdivision (a), which prohibits the trial court and counsel from commenting on a witness's assertion of a privilege. (*People v. Mincey* (1992) 2 Cal.4th 408, 441.)

As support for his claim of instructional error, defendant cites Evidence Code section 913, subdivision (b), which provides that "[t]he court, at the request of a party who may be adversely affected because an unfavorable inference may be drawn by the jury because a privilege has been exercised, shall instruct the jury that no presumption arises because of the exercise of the privilege and that the jury may not draw any inference therefrom as to

the credibility of the witness or as to any matter at issue in the proceeding." But as defendant acknowledges, the statute does not impose a sua sponte duty on the trial court to instruct, and defendant did not request such an instruction below. Furthermore, "[a]ny benefit of a cautionary instruction is 'debatable' in that it may tend to highlight the fact it was intended to minimize." (*People v. Frierson* (1991) 53 Cal.3d 730, 744; see *Bowles*, *supra*, 439 F.2d at p. 542 [recognizing tactical reasons why defense counsel might not to seek neutralizing instruction regarding absent witness].)

Finally, and contrary to defendant's assertion, the record contains no indication the jury was provided with an incorrect inference that the defense was frivolous due to Robertson's absence. The prosecutor made no attempt to spark a missing witness inference regarding Robertson during his opening statement or closing arguments. (See *People v. Ford* (1988) 45 Cal.3d 431, 445 [prosecutor not permitted to comment on defendant's failure to call logical witness if witness is unavailable]; *Morrison v. United States* (D.C. Cir. 1966) 365 F.2d 521, 524 [approving instruction explaining missing witness's exercise of privilege due to improper comments by both sides].) Meanwhile, the jury was instructed that "[n]either side is required to call all witnesses who may have information about the case. We assume the jury followed this instruction and therefore did not draw adverse conclusions about the defense based merely on Robertson's absence at trial. (*People v. Boyette* (2002) 29 Cal.4th 381, 431.) On this record, the trial court was not required to provide a cautionary instruction sua sponte regarding Robertson's exercise of his Fifth Amendment privilege, nor was defense counsel ineffective for failing to request one.

For reasons already stated, however, we conclude the judgment must be reversed due to the erroneous and prejudicial exclusion of Robertson's purportedly false statements to Detective Sanchez.

DISPOSITION

The judgment is reversed, and the matter is remanded for retrial.

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Fujisaki, Acting P.J.

WE CONCUR:

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Petrou, J.

_____
Jackson, J.

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